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Situation of human rights defenders

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, in accordance with Assembly resolution 66/164.

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Report of the Special Rapporteur on the situation of human rights defenders

Summary

In the present report, the fifth submitted to the General Assembly by the current Special Rapporteur on the situation of human rights defenders, the focus is on the use of legislation to regulate the activities of human rights defenders. The Special Rapporteur consolidates her other reports on various types of legislation. She takes into account principles developed by other special rapporteurs on issues relevant to the present report and provides recommendations and guidance on how to ensure that various types of national legislation contribute to a conducive working environment for human rights defenders.

In section I, the Special Rapporteur provides the background to the present report. In section II, she sets out the international legal framework relating to legislation regulating the activities of defenders, including the basic principles that should inform the development and application of relevant legislation.

In section III, she reviews the types of legislation affecting the work of human rights defenders, including anti-terrorism and other legislation relating to national security; legislation relating to public morals; legislation governing the registration, functioning and funding of associations; access to information legislation and official-secret legislation; defamation and blasphemy legislation; and legislation regulating Internet access.

In section IV, she sets out minimum standards to be respected in the development of legislation and procedural safeguards to be followed in the application of legislation. In section V, she provides conclusions and makes recommendations to States and other stakeholders.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 16/5 and General Assembly resolution 66/164.

2. In the present report, the Special Rapporteur focuses on the use of legislation to regulate the activities of human rights defenders, in the light of considerable concern about legislation being adopted and/or enforced in ways that restrict the activities of human rights defenders in various countries, across continents and in diverse political and social contexts.

3. The present report is, in many ways, an update of the report submitted to the General Assembly in 2003 by the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani (A/58/380, annex). In paragraph 13 of that report, the Special Representative considered the effects of security legislation on the working context of human rights defenders. She noted that some States had, in the past two years, introduced new and broad security legislation as part of a more recent declared commitment to strengthen security and combat terrorism. She went on to say that, while the full impact of very new legislation was yet to be seen, some cases then emerging showed a great potential for those very broad security provisions to be used against human rights defenders in the future. The Special Rapporteur is of the view that the time to assess how such legislative developments affect the work of human rights defenders is more than ripe.

4. Since 2003, the Special Rapporteur has in several reports focused on legislative developments in specific areas. In two reports (A/59/401 and A/64/226), she addressed the right to freedom of association. In another two reports (A/61/312 and A/62/225), she considered the right to freedom of peaceful assembly. In her report to the General Assembly in 2011 (A/66/203), she provided an overview of the rights enshrined in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders) and the most common restrictions reported to her with regard to the exercise of those rights.

5. A number of important developments have taken place since 2003. In 2005, the Commission on Human Rights established the mandate of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, which was renewed by the Human Rights Council in 2010. Also in 2010, the Council created the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and decided that, in his or her first report, the Special Rapporteur should assess best practices in relation to those rights. His first report was issued in May 2012 (A/HRC/20/27). In addition, reports by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/66/290 and A/HRC/20/17) and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/66/254) have dealt with issues relating to the use of legislation and are relevant to the working context of human rights defenders.

6. In the light of these developments, the Special Rapporteur considers it necessary to consolidate the various observations and recommendations developed over the past 10 years, to assess how various types of legislation regulate and restrict the activities of human rights defenders and to provide specific

recommendations to States and other stakeholders in this regard, including on how State actors can ensure a conducive working environment for human rights defenders.

7. In addition to information regularly received by the Special Rapporteur, a questionnaire was sent to Member States and civil society organizations seeking specific information about the use of legislation to regulate the activities of human rights defenders. The Special Rapporteur expresses thanks to those States and non-governmental organizations that responded. The responses are available in full on the section on the work of the Special Rapporteur of the website of the Office of the United Nations High Commissioner for Human Rights (www2.ohchr.org/english/issues/defenders/index.htm).

II. International legal framework

8. The Declaration on Human Rights Defenders contains provisions protecting defenders against arbitrary use of legislation to restrict their activities. Notably, article 2 (2) holds that each State is to adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the Declaration are effectively guaranteed.

9. The principle of non-discrimination is explicitly enshrined in the Declaration in its third preambular paragraph and its article 8 (1). This principle is also endorsed in, among others, article 2 of the Universal Declaration of Human Rights, articles 2 and 26 of the International Covenant on Civil and Political Rights and article 2 (2) of the International Covenant on Economic, Social and Cultural Rights. The Special Rapporteur wishes to emphasize that this principle is fundamental to the rule of law and, accordingly, to the use of legislation to regulate the activities of human rights defenders. It is closely linked to the right to equality before the law, as provided for in article 7 of the Universal Declaration of Human Rights and articles 16 and 26 of the International Covenant on Civil and Political Rights.

10. Under the Declaration on Human Rights Defenders, everyone is entitled to protection under national law in peacefully opposing or reacting against human rights violations and abuses. Pursuant to article 12 (2), States are to take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation or de facto or de jure adverse discrimination. Through their legislation and the application of national law, States are required to protect individuals and associations acting to defend human rights.

11. Articles 3 and 17 of the Declaration provide that national legislative standards should be in compliance with the international human rights obligations of the State. The Special Rapporteur wishes to emphasize that any restrictions on the rights contained in the Declaration must be in accordance with applicable international obligations and determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society, pursuant to article 17 of the Declaration.

III. Types of legislation regulating the activities of human rights defenders

12. In the present section, the Special Rapporteur reviews the types of legislation that are deemed to affect the activities of human rights defenders. For each type of legislation, she elaborates upon restrictions observed, addressing both the provisions of the legislation in question and its application.

A. Anti-terrorism and other legislation relating to national security

13. As noted in the introduction to the present report, the Special Representative of the Secretary-General on Human Rights Defenders expressed deep concern about the impact of security legislation on the activities of defenders in her 2003 report to the General Assembly. She was concerned that the broad provisions contained in many of the newly adopted pieces of legislation enacted since 11 September 2001 gave wide discretionary powers to those enforcing the laws and could potentially be used to quell dissenting views critical of the Government (A/58/380, paras. 11 and 12).

14. Information received by the Special Rapporteur indicates that the concerns expressed have been warranted. Human rights defenders have been detained, arrested, prosecuted, convicted, sentenced and harassed by Governments under the guise of the enforcement of anti-terrorism legislation and other legislation relating to national security. In the past few years, defenders exercising their rights to freedom of expression, freedom of association and, to some extent, freedom of peaceful assembly have been at particular risk.

15. In some instances, the provisions outlined in anti-terrorism legislation are so broad that any peaceful act expressing views of dissent would fall under the definition of a terrorist act, or an act facilitating, supporting or promoting terrorism. In practice, such provisions severely restrict the right of individuals and associations to assemble peacefully to protest or raise awareness of a human rights issue. The interruption of traffic or the provision of public services, which in some cases constitute offences under such legislation, can thus be interpreted as acts of terrorism if they result from the holding of a peaceful demonstration in defence of human rights. This is a clear violation of article 15 of the International Covenant on Civil and Political Rights, which requires the principle of legal certainty about what constitutes a crime to be respected.

16. Furthermore, overly broad provisions in anti-terrorism legislation severely curtail freedom of opinion and expression. The Special Rapporteur has been informed of a number of cases in which human rights defenders have been convicted on terrorism charges, notwithstanding the fact that the evidence presented has been limited to articles, blog entries and/or tweets in which the defenders in question have called for reforms in favour of human rights.

17. In this connection, the Special Rapporteur wishes to reiterate the criteria for defining terrorism established by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. In his 2006 report to the Commission on Human Rights (E/CN.4/2006/98), the Special Rapporteur emphasizes that the specificity of terrorist crimes is usually defined by

the presence of the following two cumulative conditions, noting that it is only when the two conditions are fulfilled that an act may be criminalized as terrorism:

(a) The means used, which can be described as deadly, or otherwise serious, violence against members of the general population or segments of it, or the taking of hostages;

(b) The intent, which is to cause fear among the population or to compel the Government or an international organization to do or to refrain from doing something, usually in the advancement of a political, religious or ideological cause.

18. The Special Rapporteur urges States to ensure that their anti-terrorism legislation is strictly in accordance with the above criteria. Once these criteria are met, human rights defenders will be in a much better position to conduct their activities without risk of State persecution under anti-terrorism legislation.

19. With regard to other legislation pertaining to public security and public order, the Special Rapporteur has observed developments that have adversely affected the working conditions of human rights defenders. These relate, in particular, to defenders' right to freedom of peaceful assembly.

20. The Special Rapporteur has been informed of such legislation being applied in countries to prevent democracy activists and members of the opposition from holding public assemblies. The grounds for justifying such bans are often unclear in the laws themselves, given that they tend to be limited to formulations such as "to avoid public disorder" or "to ensure that public services are not interrupted", without defining what amounts to "public disorder" or "interruption of public services". Such broad formulations provide grounds for applying the laws in question in an arbitrary and/or discriminatory manner. For example, supporters of the Government have not encountered the same restrictions as democracy activists and members of the opposition when organizing assemblies. Furthermore, in many cases, legislation on this issue provides authorities with wide-ranging powers to impose and enforce bans on assemblies for specific or even unlimited periods and in specific geographic locations.

21. With regard to States practising a regime of authorization for public assemblies, the Special Rapporteur continues to receive reports that such authorizations are denied to human rights defenders intending to raise awareness of human rights or protest against human rights violations. In other cases, assemblies have been permitted to go ahead, but not in the places requested. The Special Rapporteur recognizes the need for States to be notified of assemblies to ensure the safety of participants and surroundings. She shares the position of the Special Rapporteur on the rights to freedom of peaceful assembly and of association that a regime of notification gives the authorities sufficient notice and that this is the international standard by which States should abide in order to respect the right to assemble peacefully (A/HRC/20/27, para. 28). Nonetheless, the Government should ensure that spontaneous assemblies are permitted to take place and that protesters are able to voice their concerns to their target audience. Referring authorized assemblies to geographic locations other than those designated by the organizers would constitute a limitation on freedom of peaceful assembly.

22. Lastly, excessive use of force by law enforcement officers continues to pose a serious problem during public assemblies. States should ensure that the legal framework contains effective and non-discriminatory provisions governing

overs'ght and accountability of officials, especially with regard to their response to public demonstrations and displays of dissent. Any reported excessive use of force in the context of public assemblies should be investigated and prosecuted in a prompt, impartial and independent manner in order to hold perpetrators to account. Beyond this, the Special Rapporteur reiterates the position of the Special Rapporteur on the rights to freedom of peaceful assembly and of association that States have a positive obligation to actively protect peaceful assemblies. This obligation implies a responsibility to protect participants from individuals and groups aiming to disrupt or disperse such assemblies (ibid., paras. 33-38). Such an obligation should be enshrined in the applicable legislation.

23. The Special Rapporteur strongly encourages States to implement the recommendations made by the Special Representative in her 2006 report to the General Assembly (A/61/312) and by the Special Rapporteur on the rights to freedom of peaceful assembly and of association in his recent report to the Human Rights Council (A/HRC/20/27). This is crucial to ensuring that legislation relating to public order and security fully respects and protects the right to assemble peacefully.

24. The right to freedom of opinion and expression is also seriously compromised in a number of countries under legislation relating to national security and under the criminal code. With the growing prominence of social media and other online communication tools, States have sought to regulate these, often with detrimental consequences for the activities of defenders. Provisions that criminalize the publication of articles or photos that could harm national security, public order, public health or public interest, incite violence, constitute sedition or have negative co.. equences for the financial climate of the country are overly broad and restrictive. Not only do such provisions limit the ability of human rights defenders to express their opinion about human rights issues, they also make it difficult for defenders to know what is acceptable under the law and hence lead to self-censorship.

25. Arrest, detention and prosecution procedures under anti-terrorism and other legislation related to national security tend to limit access to persons prosecuted ·der such legislation and to information justifying their arrest. Applicable legislation typically also allows a person to be detained for an extended period without having formal charges brought against him or her. Access to a lawyer might be restricted or not allowed at all. This has serious implications for human rights defenders providing legal assistance and working to monitor prisons and detention facilities, given that they are often unable to see their clients or verify their detention conditions. The Special Rapporteur recommends that States allow civil society, community-based groups and the national human rights institution, if such an entity exists, access to persons detained under such legislation.

26. The Special Rapporteur expresses dismay about reports received that defenders who provide legal assistance to persons detained and charged under legislation relating to national security have in some cases been themselves arrested and charged for discharging their functions. There have also been cases in which lawyers have lost their licences because they have defended individuals prosecuted under such legislation. Human rights defenders have the right to provide legal assistance according to article 9 (3) (c) of the Declaration on Human Rights Defenders. Under principle 16 of the Basic Principles on the Role of Lawyers,

adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990, Governments have a duty to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; and that they do not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. The Special Rapporteur commends those States that have enacted legislative safeguards for legal representatives, typically as part of their legislation relating to equality and non-discrimination. She considers this good practice in ensuring that defenders are not subjected to judicial harassment because they have provided legal assistance.

27. There is a continued risk that the limitations placed on legal proceedings through many pieces of legislation relating to national security may jeopardize procedural safeguards, including the right of access to a lawyer, the maximum period of pre-charge detention and the right to habeas corpus. In addition to placing constraints on defenders providing legal assistance to persons detained in this context, the Special Rapporteur continues to receive reports of individuals detained under legislation relating to national security for having conducted peaceful activities in defence of human rights.

28. In this context, the Special Rapporteur wishes to emphasize that the Human Rights Committee, in paragraph 7 of its general comment No. 29, on states of emergency, found the right to a fair trial to be a non-derogable right to the extent that guarantees of a fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. The principles of legality and the rule of law, which, according to the Human Rights Committee in paragraph 6 of its general comment No. 32, on article 14 of the International Covenant on Civil and Political Rights, are non-derogable under the Covenant, require procedural safeguards to be respected for persons tried under legislation relating to national security. The Special Rapporteur therefore urges States to abide by those principles and also to ensure that the principles elaborated by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/63/223, paras. 31-42) are respected when trying human rights defenders or their clients under legislation relating to national security.

B. Legislation relating to public morals

29. Penal codes in many States contain articles whose declared objective is to preserve public morals and cohesion, with punishments ranging from fines to years of imprisonment and, in some cases, even the death penalty. In recent years, various pieces of legislation have been enacted to bring about further restrictions in the name of public morals, notably with regard to homosexuality, access to contraceptive methods, abortion, cross-dressing and gender reassignment surgery, and the provision of information regarding sexuality and sexual and reproductive health through formal or non-formal education. Such legislation has considerable implications for human rights defenders working to combat discrimination, on issues relating to sexual orientation and gender identity, and on sexual and reproductive rights.

30. The situation of defenders working on the promotion and protection of human rights of lesbian, gay, bisexual and transgender persons continues to be volatile, given that same-sex relations between consenting adults are currently criminalized in more than 75 countries worldwide.[1] In recent years, there have been legislative moves in several countries that have further curbed the activities of defenders working on these issues. Such laws typically make it a crime to operate associations working to defend lesbian, gay, bisexual and transgender rights and often contain vaguely worded provisions criminalizing individuals who promote homosexuality or facilitate, condone or even simply witness same-sex relationships. Besides the purported justification of preserving public morals, some of these laws expressly forbid promotion of homosexuality among minors. Such measures link homosexuality to paedophilia, which are two completely unrelated phenomena. This stigmatizes lesbian, gay, bisexual and transgender people and considerably discredits the work of defenders.

31. Such legislation has a profound and deteriorating effect on the fundamental freedoms of lesbian, gay, bisexual and transgender human rights defenders, in addition to non-governmental organizations and health workers engaged in HIV prevention and providing care for HIV patients. The right to freedom of association is severely compromised by such legislation, forcing lesbian, gay, bisexual and transgender associations to operate clandestinely or to cease operations altogether.

32. With regard to freedom of expression, these laws have an equally detrimental effect, given that publishing an article or expressing an opinion in favour of equal rights for lesbian, gay, bisexual and transgender people may expose someone to criminal prosecution. This leads to self-censorship among defenders working on issues relating to sexual orientation and gender identity.

33. The right to freedom of peaceful assembly faces considerable limitations under the laws in question. In countries practising a regime of authorization for public assemblies, defenders seeking to organize public meetings, marches and demonstrations in favour of equal rights for lesbian, gay, bisexual and transgender people, or to hold pride marches and festivals, are routinely denied permission to hold such events. Reasons cited include the need to uphold public morals and the risk of counter-protests. Human rights defenders who have defied such bans on public assemblies have, in many cases, been arrested and, in some cases, convicted under the applicable legislation relating to preservation of public morals. The Special Rapporteur wishes to stress that, on the basis of the principle of non-discrimination, these justifications are insufficient to prevent such assemblies from taking place. If security risks are involved, it is the duty of the State to provide protection to those exercising their right to assemble peacefully, pursuant to article 12 (2) of the Declaration on Human Rights Defenders.

34. It should also be noted that, in some countries, such legislation currently exists in draft form only. In some cases, legislation has been pending in parliament for several years. In the Special Rapporteur's view, however, even in draft form such

[1] As laws are often vaguely worded, it can be difficult to determine whether same-sex relationships constitute an offence. In its report for 2012, *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Acts between Consenting Adults*, the International Lesbian, Gay, Bisexual, Trans and Intersex Association puts the figure at 78. According to the United Nations High Commissioner for Human Rights, same-sex relationships are criminalized in 76 countries (A/HRC/19/41, para. 40).

legislation risks having a chilling effect on the situation of human rights defenders working on sexual orientation and gender identity issues. The same applies in cases in which legislation is in place but has not been used for several years. Given that this situation continues to negatively affect the work of human rights defenders, the Special Rapporteur recommends that such laws be repealed.

35. The Special Rapporteur emphasizes that the Human Rights Committee has found adult consensual sexual activity in private to be part of a person's privacy, which is protected under article 17 of the International Covenant on Civil and Political Rights (CCPR/C/50/D/488/1992, para. 8.2). Laws criminalizing consensual homosexual acts conducted in private violate a person's rights to privacy and to freedom from discrimination on the basis of sexual orientation and gender identity, in breach of applicable international human rights law (A/HRC/19/41, para. 41). Defenders working on these issues are advocating human rights standards that are internationally recognized. States should therefore ensure that defenders working to promote lesbian, gay, bisexual and transgender rights can do so in a conducive and open environment without fear of persecution. Given that it is the right of human rights defenders to develop and discuss new human rights ideas and principles and to advocate their acceptance under article 7 of the Declaration on Human Rights Defenders, it is the responsibility of the State to ensure that its legislation relating to public morals caters to this right and does not compromise the rights of defenders to freedom of expression, freedom of association and freedom of peaceful assembly.

36. Defenders of sexual and reproductive rights also experience constraints resulting from legislation seeking to preserve public morals. Associations promoting such rights have faced restrictions for having handed out information about abortion and referred women to appropriate medical facilities. In many cases, lawsuits have been brought by individuals, organizations and State actors, claiming that such activities are against the law. Medical and health-care professionals have faced similar actions because they have discharged their functions. The Special Rapporteur has observed that this has also taken place in countries in which sexual and reproductive rights, including the right to abortion, are guaranteed in the national legal framework. This is particularly distressing because, as noted by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, women are the main receivers of these services and by being denied access to them they face discrimination and disempowerment (A/66/254, paras. 16 and 17).

37. Sexual and reproductive rights defenders thus play a significant role in ensuring respect for women's human rights. Such activities should not be subject to criminal sanctions. Furthermore, States with a legal framework guaranteeing sexual and reproductive rights need to ensure that such legislation is enforced without discrimination. Judicial harassment against sexual and reproductive rights defenders should not be tolerated, and judges and prosecutors have a key role in this regard. The Special Rapporteur also wishes to emphasize that medical and health-care professionals are protected under article 11 of the Declaration on Human Rights Defenders, according to which everyone has the right to exercise his or her occupation or profession, in compliance with relevant national and international standards of occupational and professional conduct or ethics, including human rights standards.

38. The role of human rights defenders in disseminating information about sexual and reproductive rights, whether as part of State institutions set up for this purpose, through non-governmental organizations or through the formal education system, needs to be clearly defined in legislation relating to public morals to ensure that such activities are not criminalized. Defenders who provide evidence-based sexual and reproductive health information and education should in no circumstances face criminal sanctions, in line with article 6 (b) of the Declaration on Human Rights Defenders (see also A/66/254, para. 65).

C. Legislation governing the registration, functioning and funding of associations

39. Freedom of association is a fundamental right protected under article 5 (b) of the Declaration on Human Rights Defenders, in addition to numerous other international instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The ability of human rights defenders to associate under national legislation is of utmost importance, underscored by the fact that most provisions in the Declaration on Human Rights Defenders emphasize the rights of human rights defenders to engage in activities individually and in association with others (arts. 5-9, 11-13 and 17).

40. As noted in the introduction to the present report, the Special Rapporteur has in two previous reports focused on the issue of freedom of association (A/59/401 and A/64/226). The Special Rapporteur on the rights to freedom of peaceful assembly and of association issued an extensive report to the Human Rights Council in 2012 that contained best practices relating to, among other things, the right to freedom of association (A/HRC/20/27, paras. 51-76). Accordingly, the Special Rapporteur deems it unnecessary to further elaborate on the issue herein. She notes, however, that the recommendations made in the reports are far from being fully implemented. In fact, it appears that recent legislative developments in various countries are further restricting the right to associate freely. In the following section, the Special Rapporteur provides observations in this regard and assesses how the latest developments correspond to provisions outlined in the Declaration on Human Rights Defenders and other relevant international human rights instruments.

41. Information received by the Special Rapporteur indicates that defenders who operate individually or as part of associations that are not registered with the Government are criminalized in several countries. Generally, such activities are punishable under the penal code or the law on associations. They are, in some cases, linked to national security or public order, to which associations, in vaguely worded terms, are deemed to pose a threat. In most cases, however, the penal code or the law on associations forbids activities by associations that are not registered with the authorities and imposes penalties ranging from fines to prison sentences and, in one instance, death.

42. The Special Rapporteur has previously argued that the insistence by a Government that informal groups must register reflects an intention to control their activities and deter groups that are critical of the Government from expressing themselves (A/64/226, para. 60). The Special Rapporteur calls upon States to repeal laws criminalizing unregistered associations working towards the realization of human rights. It should be up to the associations themselves to decide whether they

wish to register in order to benefit from the advantages of being a registered association.

43. The Special Rapporteur has previously recommended that States apply a regime of notification rather than a regime of authorization (ibid., para. 59). It should suffice that associations wishing to register with the authorities present a declaration or notification to the applicable Government entity.

44. The Special Rapporteur is concerned that, through new laws that have recently been passed or are under discussion, Governments are increasingly seeking to restrict the thematic areas upon which associations are permitted to work. Examples include prohibition from engaging in political activities, from defending political rights and from including human rights in the association's objectives. In the Special Rapporteur's view, such provisions are contrary to the spirit of human rights, notably the principles of indivisibility, interconnectedness and interdependence, which emphasize that all human rights are equally important and cannot be separated. Furthermore, they violate the right of human rights defenders to non-discrimination. The Special Rapporteur urges the States in question to remove such registration criteria from their legal framework.

45. Submissions for registration of associations need to be assessed in a timely and independent manner. The body responsible for dealing with associations should be independent of the Government. It should be set up in close consultation with human rights defenders, including independent members of civil society, who should also play a significant part in the assessment of the submissions. As argued by the Special Rapporteur on the rights to freedom of peaceful assembly and association, legislation should stipulate the acceptable time frame for assessing a submission and, if this time frame is not respected by the responsible body, associations should be assumed to be operating legally (A/HRC/20/27, para. 60).

46. Another development in recent legislation is that the authorities are being granted extensive powers to supervise the activities of associations. In many cases, additional reporting requirements are imposed on associations in order for them to retain their licence. In the most extreme cases, the Government is authorized by law to place associations under surveillance, to force them to take management decisions and to demand any documents in an association's possession, without prior notice. The Special Rapporteur believes that such provisions amount to a serious infringement of the right to freedom of association. She reiterates the recommendation by the Special Representative that the only legitimate requirements that should be imposed on associations should be to ensure transparency (A/59/401, para. 82 (l)).

47. Lastly, the Special Rapporteur has observed increasing restrictions worldwide on associations' access to funding, especially funding received from abroad. There is a trend whereby the percentage of funding that an association can receive from abroad is limited, in some cases to as low as 10 per cent. Associations are also obliged in some countries to seek authorization from the authorities before being permitted to conduct fundraising activities.

48. Under the guise of protecting national sovereignty or national interests, some States have enacted legislation that outlaws associations working to defend political rights or engaging in political activities if they receive foreign funding. In at least one case, this amounts to treason under the penal code. In other cases, such

associations are required to indicate on their publications that they are performing the functions of foreign agents.

49. The Special Rapporteur is very concerned about such developments. They profoundly and negatively affect the work of human rights defenders, who are often dependent on funding from abroad to conduct their activities owing to a lack of available domestic sources. She urges States to respect article 13 of the Declaration on Human Rights Defenders, which states in clear terms that everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the Declaration. Both the Special Representative and the Special Rapporteur on the rights to freedom of peaceful assembly and of association have emphasized the principle that non-governmental organizations should be entitled to foreign funding to the same extent as Governments (see A/59/401, para. 82 (l), and A/HRC/20/27, para. 69, respectively). The Special Rapporteur agrees completely with this position.

50. Treason charges brought against defenders for receiving funds from abroad to promote political rights and to conduct other advocacy activities are unacceptable for the reasons mentioned above. Such provisions, in addition to those requiring associations to declare that they are performing functions of foreign agents, lead to extensive stigmatization of the work of human rights defenders.

D. Access to information legislation and official-secret legislation

51. Access to information is an extremely important aspect of the work of human rights defenders, given that it enables them to collect information about violations, monitor public authorities and issue informed recommendations to Governments and other stakeholders on how the human rights situation can be improved. The right to seek, have access to, hold and impart information is protected under articles 6 and 14 of the Declaration on Human Rights Defenders.

52. In recent years, an increasing number of States have passed legislation guaranteeing the right of access to information held by public authorities, a development that the Special Rapporteur warmly welcomes. To ensure a conducive working environment for human rights defenders, there remains a need to harmonize such legislation with official-secret legislation, which is used to classify and withhold information that could harm public security.

53. The Special Rapporteur has been informed of cases in which human rights defenders have been charged and convicted because they have disseminated information deemed to be officially secret or taken positions in public in response to such information. This has also happened in States in which legislation permitting access to information is in place. The Special Rapporteur calls upon States to ensure that their legislation permitting access to information is fully compliant with international standards, especially the Joint Declaration on Access to Information and Secrecy Legislation issued by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Representative on freedom of the media of the Organization for Security and Cooperation in Europe and the Special Rapporteur on freedom of expression of the Organization of

American States.[2] The Special Rapporteur emphasizes in particular that the right of access to information should be subject to narrow and clearly defined limitations to protect overriding public and private interests, including the right to privacy. As mentioned in the Joint Declaration, exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.

54. Furthermore, official-secret legislation should in no circumstances be used as a tool to silence voices of dissent and persecute human rights defenders. The responsibility to protect information deemed to be secret should lie with Governments, and State officials responsible for this should be held accountable. Human rights defenders, including journalists and media workers, should never be held liable for publishing or disseminating such information. This should also hold true in cases in which the information has been leaked to them, unless they committed a crime to obtain the information.[2]

55. Some information may legitimately be withheld from the public if its dissemination represents a risk to national security, public health or morals or protection of other overriding interests. Such provisions should, however, be clearly defined in official-secret legislation, which should also indicate the precise criteria to be used in determining whether information can be declared secret. In line with articles 6 and 14 of the Declaration on Human Rights Defenders, official-secret legislation should never be used to prevent the disclosure of information that is in the public interest.

E. Defamation and blasphemy legislation

56. The attention of the Special Rapporteur has been drawn to recent cases in which human rights defenders have been charged with defamation and, in some cases, blasphemy because they have published articles, blog entries or tweets or expressed opinions in public. The purpose of defamation legislation is to protect an individual's reputation from false and malicious attacks, which, according to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, is a valid reason for restricting freedom of expression (A/HRC/20/17, para. 83). He has also observed that almost all countries have some form of defamation legislation in place under various terms, including libel, calumny, slander, insult, *desacato* or lese-majesty. He has further noted that the problem with defamation cases is that they frequently mask the determination of political and economic powers to retaliate against criticisms or allegations of mismanagement or corruption, and to exert undue pressure on the media (ibid.).

57. In some countries, criticism of Government representatives, most notably the Head of State, is defined as an offence of defamation under the penal code, normally punishable by fines but in some cases also by months of imprisonment. The Special Rapporteur is concerned that such provisions are used to silence public criticism and serve as an obstacle to public debate about human rights issues, for which public

[2] See www.article19.org/resources.php/resource/3053/en/joint-declaration-on-access-to-information-and-secrecy-legislation.

officials are generally accountable. Article 8 (1) of the Declaration on Human Rights Defenders gives defenders the right to have effective access to participation in the Government of his or her country and in the conduct of public affairs, which in the Special Rapporteur's view is dependent on being able to debate the performance of public officials and the effectiveness of public policies and their compliance with human rights standards. The Special Rapporteur shares the position of the Special Rapporteur on the promotion and protection of freedom of opinion and expression that criminal prosecution for defamation inevitably leads to censorship and hinders expression of dissent, in contravention of the right to freedom of expression (A/HRC/20/17, para. 87). She therefore urges States to decriminalize defamation.

58. Defamation has been decriminalized in several countries in recent years, a development welcomed by the Special Rapporteur. Provisions under civil law continue, however, to be used to target human rights defenders. In several cases, defenders have been ordered to pay fines that are largely disproportionate to the offence committed. The Special Rapporteur shares the concern expressed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression that high and disproportionate financial sanctions risk bankrupting small media outlets, including outlets set up expressly to report on human rights issues, and therefore represent a considerable threat to freedom of expression (ibid., para. 85). Consequently, she calls upon States to ensure that penalties for defamation under civil law are limited in order to ensure proportionality to the harm done.

59. In several countries, statements that undermine religion and/or call religious laws and rulings into question are punished severely by blasphemy legislation. While recognizing the right to freedom of religion and belief, the Special Rapporteur insists on the right of human rights defenders to discuss human rights ideas and issues, including religious practices that might be in contravention of international human rights standards, pursuant to article 6 of the Declaration on Human Rights Defenders. The Special Rapporteur is particularly concerned about the situation of defenders of women's human rights, given that those speaking out against abuses against women in this connection tend to face harsh punishments, including long prison sentences.

60. The Special Rapporteur expresses deep concern that provisions of defamation and blasphemy legislation continue to have a devastating effect on the situation of human rights defenders in many countries. The risk of being prosecuted under such laws leads to self-censorship among defenders, which hinders sincere and profound debates about human rights issues. Such debates being an integral part of the upholding of human rights, the Special Rapporteur calls upon States to revise these laws in accordance with the recommendations made herein.

F. Legislation regulating Internet access

61. Over the past decade, the Internet has become an indispensable tool for the work of many human rights defenders, especially as a means of imparting views, sharing information about human rights and human rights violations and connecting with other human rights defenders. Its potential to assist human rights defenders and the rest of society in bringing about developments favourable to the human rights

situation in a community or country is enormous. The Special Rapporteur is therefore disappointed at the broad restrictions applied to Internet access in numerous countries, including to association, news and social networking websites and blogs. In this context, the Special Rapporteur calls upon States to consider carefully what restrictions are truly necessary, noting that the criteria set out by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his 2011 report to the General Assembly (A/66/290, para. 15) should be followed closely to this end.

62. The Special Rapporteur is also concerned that personal information about human rights defenders obtained through social networking and other websites might compromise their security, especially in the light of new legislative developments authorizing Governments to widely monitor websites in several countries. States should show utmost restraint in this regard and, above all, ensure that such legislation is not used to clamp down on human rights defenders. The above-mentioned criteria developed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression are useful also in this regard.

IV. Minimum standards regarding legislation

63. In the present section, the Special Rapporteur sets out minimum standards that should be applied in the development and application of legislation affecting the activities of human rights defenders. It aims to remind States of international principles that ensure respect for human rights and to show how these can be made operational to ensure a conducive working environment for human rights defenders.

A. Principle of legality

64. The principle of legality is enshrined in article 15 of the International Covenant on Civil and Political Rights, which provides that no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. In accordance with the principle of legality, all legislation must be clearly defined, determinable and non-retrospective. Any law that fails to meet this basic criterion does not comply with the legality principle. Laws must give fair warnings to citizens of the nature of the conduct declared to constitute a criminal or civil offence.[3] Furthermore, in the definition of an offence, the law must stipulate achievable limits on conduct, so that individuals are able to adapt their behaviour within reasonable limits.

65. There are further provisions associated with the legality principle with regard to promulgation of legislation. Before a piece of legislation is adopted, it must be promulgated democratically, meaning that it should be subject to broad consultations with individuals and associations concerned, including civil society.

[3] See also the general principles of international criminal law developed by International Criminal Law Services, available from wcjp.unicri.it/deliverables/docs/Module_3_General_principles_of_international_criminal_law.pdf.

Moreover, once a law is adopted, it must be publicized using the appropriate channels to ensure that the public is aware of what constitutes punishable behaviour.

66. Pursuant to article 15 of the Covenant, the principle of legality prohibits retroactive application of crimes and penalties. To incur criminal responsibility, behaviour must be prohibited and carry criminal sanction at the time of conduct. Article 15 further provides that no heavier penalty may be imposed than that applicable at the time at which the criminal offence was committed. This requires legislation to be enforced in a regular and consistent manner, with penalties handed down as prescribed for in the applicable legislation. The principle therefore protects individuals from State abuse and interference, while ensuring the fairness and transparency of the judicial authority.

67. The Special Rapporteur notes that States have an obligation to ensure that all legislation, including criminal legislation, complies with the principle of legality. For individuals to conduct their lives, including their activities in defence of human rights in a predictable manner, either individually or in association with others, States must ensure that legislation is consistent, reasonable and easily understood by the general public. Consequences of broadly defined laws include the impairment of rights protected under the Declaration on Human Rights Defenders and loopholes within the legal system that could be used to harass and intimidate defenders.

B. Principles of necessity and proportionality

68. The principle of necessity is used in numerous areas of international law and has been invoked by international tribunals in case law. It requires States to ensure that acts that are not in conformity with international obligations are committed as the only way to safeguard an essential interest of the State against a grave and imminent peril, as codified by the International Law Commission in article 25 (1) (a) of its draft articles on responsibility of States for internationally wrongful acts. Article 25 (1) (b) requires States to ensure that such an act does not impair an essential interest of another State or of the international community.

69. The Special Rapporteur concurs with the view of the Special Rapporteur on the promotion and protection of human rights while countering terrorism that specific counter-terrorism legislation should be enacted only following serious consideration of whether it is necessary and that the rule of law also prescribes that the laws restricting the rights to freedom of association and assembly must establish the conditions under which those rights can be limited. Restrictions that would be compatible neither with the law nor with the requirements set out in articles 21 and 22 of the International Covenant on Civil and Political Rights themselves would be in violation of the Covenant (A/61/267, para. 18). The Special Rapporteur is of the opinion that this applies also to other forms of legislation, which should be subject to similar scrutiny on the basis of the principle of necessity before being enacted.

70. While the principle of necessity aims to assess whether the objective of a law is necessary, the principle of proportionality looks at the degree to which the repercussions of the law are proportionate to its objective. In this way, it endeavours to balance individual rights and the interests of the general public. Regional human rights mechanisms have developed interesting models to assess proportionality, such as the "margin of appreciation" applied by the European Court of Human Rights and

"the just exigencies of a democratic society" in the case of the Inter-American Court of Human Rights.[4]

71. In the Special Rapporteur's view, the principle of necessity requires the State to show that the desired result is necessary and that the law in question is the best available means of achieving that result. It must be demonstrated that the impact of the law is as targeted as possible, thereby impairing the exercise of the affecting rights as little as possible. Furthermore, in accordance with the principle of proportionality, the impact of the restrictions must be proportionate and the harm caused by the restrictions cannot outweigh the benefits derived from applying the restrictions. The ability of individuals to exercise their rights to freedom of expression, association and peaceful assembly is an assessment of paramount importance, which the State needs to make as early as possible to ensure that those rights are not impaired.

C. Limited nature of derogations

72. A system of derogations is enshrined in various human rights treaties, including the International Covenant on Civil and Political Rights. This permits States to temporarily modify their obligations in exceptional circumstances, such as in times of emergency, including armed conflicts, civil and violent unrest, environmental and natural disasters.

73. While exceptional measures are permissible in such circumstances, States are required to fulfil requirements as established in law to ensure that during times of emergency derogation clauses do not create a legal vacuum. In particular, States are required to qualify the level of severity, temporariness, proclamation and notification, legality, proportionality, consistency with other obligations under international law, non-discrimination and, lastly, non-derogability of certain rights recognized as such in the relevant treaty. The system of derogation aims to ensure that the rights of individuals are protected during times of crisis by placing reasonable limits on the powers of Government to protect national security.

74. Derogation clauses are provided for in article 4 of the International Covenant on Civil and Political Rights, article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 27 of the American Convention on Human Rights. The list of non-derogable rights varies by treaty, and obligations differ according to the treaty to which the State is a party.

75. The Special Rapporteur wishes to emphasize that a state of emergency does not give State authorities free rein to silence human rights defenders. Any derogation of the right to safeguard individuals working for the protection of human rights must be provided for in law, observe the principles of necessity and proportionality and be justified by specific reasons.

[4] See Cedric Ryngaert, "State responsibility, necessity and human rights", Institute for International Law, Working Paper No. 141 (Leuven, Institute for International Law, December 2009). Available from www.law.kuleuven.be/iir/nl/onderzoek/wp/WP141e.pdf.

D. Principle of non-discrimination

76. The Special Rapporteur underlines that, to comply with their obligations under international human rights law, States also need to respect the principle of non-discrimination, as outlined in section II above. Notably, beyond discriminatory provisions that are prohibited under international law, States should not adopt provisions that can be shown to have a discriminatory effect at their outset. This is made clear in article 12 (2) of the Declaration on Human Rights Defenders, under which States are obliged to provide protection against both de facto and de jure adverse discrimination. The Special Rapporteur notes the importance of broad consultations with civil society in drafting legislation and the willingness of the Government to incorporate feedback from civil society in this regard.

E. Constitutional safeguards

77. The constitutional safeguards provided for by many States offer human rights defenders the rights to freedom of assembly and association, a fair trial and to be free from arbitrary arrest and detention, torture or degrading treatment, among others. Those rights notwithstanding, defenders worldwide face serious constraints when promoting and protecting human rights. Many such constraints are embedded in national laws, including recently enacted legislation.

78. The Special Rapporteur notes that, in some cases, defenders have successfully challenged the constitutionality of oppressive laws, notably in national constitutional courts, often rooted in the argument that the applicable law infringed basic human rights guaranteed in a country's constitution. Such avenues of recourse should be easily accessible to individuals and associations seeking to defend human rights. These procedures being an integral part of the rule of law, States should do their utmost to make them easily accessible to ordinary citizens and their legal representatives.

F. Procedural safeguards

79. Procedural safeguards, including time limits for investigations and the obligation to inform suspects that they are under investigation, are built into criminal legislation in many countries. They are designed to prevent the use of unreliable evidence and to oblige prosecutors to consider evidence impartially. These basic precautions are often ignored, however, with prosecutors in many countries frequently detaining defenders for longer periods than permitted and conducting investigations without informing the defender of the nature of the inquiry carried out or of the subsequent charges.

80. In accordance with international standards, prosecutors are prohibited from continuing proceedings when an impartial investigation demonstrates that the charge is unfounded. These standards are violated through the use of unreliable and uncorroborated evidence. In some cases, prosecutors demonstrate further prejudice toward a predetermined outcome by launching an investigation or filing charges in the absence of evidence. The Special Rapporteur notes with concern that preliminary investigations may be used to intimidate, silence or otherwise deter defenders from carrying out their legitimate activities to promote human rights. This

contravenes international human rights standards relating to the role of prosecutors, notably articles 13 and 14 of the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which state that prosecutors should perform their duties in an impartial and non-discriminatory manner and that they are not to initiate or continue prosecution, or make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

81. Furthermore, in some circumstances, prosecutors fail to inform defendants of the charges against them once the preliminary investigation has been completed or even after they have been arrested. Of particular concern is the practice in some States whereby prosecutors, in addition to other Government officials, equate the promotion of human rights with subversive behaviour, publicly describing defenders as, among other things, terrorists or anti-nationalists, even before a trial has begun. Such behaviour renders a fair trial impossible and breaches the presumption of innocence by which all prosecutors and judicial authorities must abide.

82. The Special Rapporteur also emphasizes the role of judges in ensuring that procedural safeguards are respected. As observed by the Special Rapporteur on the independence of judges and lawyers in her 2011 report to the General Assembly (A/66/289), judges are obliged under international law to ensure fundamental rights are enjoyed without discrimination. She stated that that entailed a proactive duty to ensure that they were upholding international equality and non-discrimination standards in both case deliberations and the application of court procedures. She pointed out that judges could recommend the repeal or amendment of a law or rule if inconsistent with international human rights standards (ibid., para. 38). This is an important procedural safeguard to ensure that unfounded and politically motivated charges are not brought against individuals for having acted in defence of human rights.

V. Conclusions and recommendations

83. **The Special Rapporteur remains deeply concerned that national legislation continues to restrict the activities of human rights defenders. Recent legislative developments in a number of countries are not in compliance with international human rights standards, notably the Declaration on Human Rights Defenders, and do not contribute to a conducive working environment for defenders.**

84. **On the basis of a review of the various types of legislation affecting the activities of human rights defenders, the Special Rapporteur wishes to make the recommendations set out below.**

85. **States should ensure that their anti-terrorism legislation clearly identifies acts defined as terrorism and punishable as such, in accordance with the criteria developed by the Special Rapporteur on the promotion and protection of human rights while countering terrorism (E/CN.4/2006/98, paras. 37 and 38).**

86. **States need to ensure that national legislation designed to guarantee public safety and public order contains clearly defined provisions and that no discrimination is permitted in the application of such legislation, notably in response to the exercise of the rights to freedom of expression, association and peaceful assembly.**

87. **States' legal framework should provide for effective and non-discriminatory provisions governing oversight and accountability of public officials, including law enforcement officials, especially with regard to their responses to peaceful public displays of dissent and demonstrations where human rights issues are being raised.**

88. **States should allow access by non-governmental organizations and national human rights institutions, where such exist, to persons detained under anti-terrorism and other legislation relating to national security.**

89. **States should in no circumstances prosecute human rights defenders for providing legal assistance to persons detained and charged under legislation relating to national security.**

90. **States should respect the right to a fair trial and all procedural safeguards contained in that right when trying suspects under anti-terrorism and other legislation relating to national security, in line with the principles elaborated by the Special Rapporteur on the promotion and protection of human rights while countering terrorism (A/63/223, paras. 31-42).**

91. **States should repeal all legislation that, with the declared objective of preserving public morals, criminalizes the activities of human rights defenders working on sexual orientation and gender identity issues, including laws that have not been applied for a significant period.**

92. **States should do their utmost to protect human rights defenders from judicial harassment, including in cases in which defenders are discharging their functions, notably in defence of sexual and reproductive rights.**

93. **States should in no circumstances criminalize peaceful activities by human rights defenders who operate individually or as part of unregistered associations.**

94. **States should operate a regime of notification, rather than a regime of authorization, for associations that wish to register with the Government.**

95. **States should ensure that submissions from associations intending to register are assessed according to clear and publicly available criteria and processed in a timely manner. States should in no circumstances place limitations on the areas, including rights-based areas, on which an association is allowed to work in order to obtain registration, provided that such activities are peaceful.**

96. **States should ensure that reporting requirements placed on associations are reasonable and do not inhibit functional autonomy.**

97. **States should refrain from imposing legal restrictions on potential sources of funding for associations, including foreign sources. Laws criminalizing activities in defence of human rights carried out with foreign funding, including under treason charges, should be repealed.**

98. **States should ensure that the right of access to information is subject to narrow and clearly defined limitations to protect overriding public and private interests, including the right to privacy. Provisions for withholding information should be clearly defined by law.**

99. **States should not prosecute human rights defenders or subject them to liability for publishing or disseminating information classified as secret. This**

should also apply in cases in which the information has been leaked to them, unless they committed a crime to obtain the information.

100. States should decriminalize defamation and repeal any provision within the penal code that protects public officials from scrutiny and criticism.

101. States should ensure that penalties for defamation under civil law are limited in order to ensure proportionality to the harm done.

102. States should ensure that civil society, national human rights institutions and other stakeholders are involved in a broad consultative process to ensure that the drafting of new legislation is in compliance with the Declaration on Human Rights Defenders and other applicable international human rights instruments. States should provide adequate time for such stakeholders to analyse the implications of the draft law in question and ensure that feedback is easy to provide and taken into account in the preparation of the law.

103. States, including prosecutors, should ensure that criminal cases against individuals, including human rights defenders, are subject to an impartial and independent investigation in compliance with due process standards. All unsubstantiated cases should be closed immediately, with individuals being afforded the opportunity to lodge complaints directly with the appropriate authority.

104. States should ensure that their legislation complies with basic rights enshrined in their constitutions. Avenues of recourse should be readily available to individuals, including human rights defenders, to challenge the constitutionality of existing and new legislation.

105. Judges should proactively uphold international equality and non-discrimination standards in both case deliberations and the application of court procedures.

106. Judges should, when presented with relevant cases, recommend the repeal or amendment of a law or rule if it is inconsistent with international human rights standards.

107. Public officials should refrain from making statements that discredit or stigmatize human rights defenders.

108. Justice and law enforcement officials should familiarize themselves with the provisions of the Declaration on Human Rights Defenders, in addition to the responsibilities that its provisions impose on them.

109. National human rights institutions should be closely consulted in the development of new legislation. They should continue to monitor existing legislation and consistently inform the State about its impact on the activities of human rights defenders.

110. Civil society should provide input to States on the potential implications of draft legislation when such legislation is being developed. Civil society actors should continue to monitor relevant laws and their effect on the working context of human rights defenders.